

**3      *Effect of changes in the character and scope of a unit due to a reorganization or realignment in agency operations***

This section discusses changes due to a reorganization or realignment in agency operations. These issues arise in petitions which seek to clarify or amend a certification or recognition in effect or a matter relating to representation. This section is divided into six parts:

**A.      Purpose and Standards for Resolving Issues Arising from Reorganizations.**

**1.      Analyzing the Effect of Reorganizations on Existing Bargaining Units**

**2.      Relevant Information Required**

**B.      Successorship.**

**C.      Accretion.**

**D.      Competing Claims of Successorship and Accretion.**

**E.      Consolidated Units.**

**F.      Unresolved Issues.**

**A.      Purpose and Standards for Resolving Issues Arising from Reorganizations.**

**1.      Analyzing the Effect of Reorganizations on Existing Bargaining Units**

Section 7111(b)(2) provides, in relevant part, that if a petition is filed with the Authority:

by any person seeking . . . an amendment to, a certification then in effect or a matter relating to representation; the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for

which a transcript shall be kept) after a reasonable notice.

This section applies whenever a petition is filed to resolve the effect of an agency reorganization on an existing unit, either with respect to employees who remain in the unit, employees who have been transferred from the unit or employees who have been added to the unit. See *CHM 27.5, Hearing Requirements*.

The substantive factors applied in cases arising from reorganizations have remained valid and consistent since Executive order 11491. **As discussed in *RCL 1, Appropriate Units*, any case that concerns a question of representation requires an appropriate unit determination prior to proceeding to other issues.** Section 7112(a) of the Statute sets out the criteria for determining whether a unit is an appropriate unit for exclusive recognition:

The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under [the Statute], the appropriate unit should be established on an agency, plant, installation, functional or other basis and shall determine any unit to be an appropriate unit only if the determination ***will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with and efficiency of the operations of the agency involved.***

Thus, in making determinations under section 7112(a), the Authority examines the factors presented on a case-by-case basis.<sup>1</sup> To meet the

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<sup>1</sup> *United States Department of the Navy, Fleet and Industrial Supply Center, Norfolk, Virginia*, 52 FLRA 950 (1997) (*FISC, Norfolk*) (a reorganization case in which the Authority considered how to resolve representation issues that result from a reorganization where both successorship and accretion are claimed to apply to the employees) citing *Defense Mapping Agency, Aerospace Center, St. Louis, Missouri*, 46 FLRA 502 (1992) (*Defense Mapping Agency*) (the Authority found that the employees were part of four functionally distinct groups of employees who did not share a community of interest with the employees in the Union's existing unit and whose inclusion in the existing unit would not foster effective dealings or efficiency of the Agency's operations).

requirements of the Statute, a proposed unit need only be an appropriate unit.<sup>2</sup> The Authority requires that each of the appropriate unit criteria be given equal weight in order to foster the goal of a more effective and efficient government.<sup>3</sup> Moreover, as first clarified by the Federal Labor Relations Council (FLRC), the Authority must affirmatively determine that any proposed unit of exclusive recognition satisfies each of the three criteria before that unit can properly found to be appropriate<sup>4</sup>.

The Authority is required to make appropriate unit determinations to resolve reorganization-related questions related to representation in the same manner as when it decides the appropriateness of units of unrepresented employees in election petitions.<sup>5</sup> Thus, in reorganization cases, the Region develops a complete factual record upon which it can examine each of the appropriate unit criteria and make an affirmative determination regarding the effect of the reorganization on the continued

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<sup>2</sup>*American Federation of Government Employees, Local 2004*, 47 FLRA 969, 973 (1993) (Authority upheld RD's decision that petitioned-for unit is appropriate).

<sup>3</sup>*FISC, Norfolk* at n. 6 citing *Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airways Facilities Sector*, 3 FLRC 235 (1975) (*Tulsa AFS*) [an appeal to the Federal Labor Relations Council (FLRC) from a decision of the Assistant Secretary that considered the Assistant Secretary's responsibilities when deciding appropriate unit questions arising from reorganizations. The FLRC decision also discussed the development of the appropriate unit criteria under Executive Order 11491].

<sup>4</sup>*Tulsa AFS* at 240.

<sup>5</sup>*Morale, Welfare and Recreation Directorate, Marine Corps Air Station, Cherry Point, North Carolina*, 45 FLRA 281(1992) (*Morale, Welfare*) (a case that considered the effects of a reorganization on an established unit and also provided policy guidance when examining the impact of a reorganization on an established unit) and *Labor-Management Relations in Federal Service*, 1975, at 51, published by the Federal Labor Relations Council, FLRC 75-1 (4/75) ("the resolution of reorganization-related representation problems is already governed by a policy requirement in section 10(b) of E.O. 11491 that units of exclusive recognition must ensure a clear and identifiable community of interest among the employees involved and must promote effective dealings and efficiency of agency operations").

appropriateness of the unit(s) and the rights of the parties.<sup>6</sup>

The record includes information relevant to making an affirmative determination with respect to each of the three appropriate unit criteria. Evidentiary considerations which may be relied upon to support a finding of a community of interest, for instance, may not be solely the basis for concluding that a unit will promote effective dealings and efficiency of operations.<sup>7</sup> Finally, the Authority is required to decide appropriate unit questions consistent with the policy of preventing further fragmentation of bargaining units and reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure.<sup>8</sup>

To carry out their responsibilities to assist the parties in resolving representation issues arising from reorganizations, it is imperative that Regional Office personnel become familiar with Authority and Assistant Secretary case law concerning reorganizations and other realignments in agency operations that may result in substantial changes in the character and scope of exclusively recognized bargaining units. Regional Office personnel:

- < identify representation issues,
- < obtain relevant facts,
- < discuss applicable case law and
- < assist the parties in narrowing and resolving issues consistent with the Statutory requirements for appropriate units and unit eligibility (see *HOG 2.3*, ethical considerations, *CHM 1* and *CHM 25*).

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<sup>6</sup> *Morale, Welfare at 286* citing *Federal Aviation Administration, Aviation Standards National Field Office (Aviation Standards)*, 15 FLRA 60, 63 (1984) (the Authority considered the effects of a reorganization on a variety of bargaining units and found different results based on the record facts).

<sup>7</sup> *Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California et al.*, 4 FLRC 669 (1976) (*DCASR*) (three election petitions which the FLRC considered on appeal from the A/SLMR and reaffirmed and elaborated on the discussion in *Tulsa AFS*).

<sup>8</sup> *Army and Air Force Exchange Service, Dallas, Texas*, 5 FLRA 657, 661-662 (1981) (*AAFES*) (Authority found proposed consolidated unit appropriate).

## 2. Relevant Information Required:

The Authority in *Morale, Welfare and Recreation Directorate, Marine Corps Air Station, Cherry Point, North Carolina (Morale, Welfare)*, 45 FLRA 281 (1992) set forth the responsibility of a Regional Director in deciding cases arising from changes to existing units that are caused by reorganizations. The standard set forth in *Morale, Welfare* is still applied to any case filed by a party or parties that raise a matter related to the representation of employees in bargaining unit(s) affected by reorganizations or realignments of agency operations.

...the Regional Director must examine the effect of the reorganization in order to determine the continued appropriateness of the unit or units and the rights of the parties.

*Morale, Welfare*, 45 FLRA at 286. In *U.S. Department of the Navy, Commander, Naval Base, Norfolk, Virginia (USN)*, 56 FLRA 328 at 332 (2000) the Authority stated that, "in determining whether an existing unit remains appropriate after a reorganization, it will focus on the changes caused by the reorganization," (citing *Morale, Welfare*) "and assess whether those changes are sufficient to render a recognized unit inappropriate" citing *Defense Logistics Agency, Defense Supply Center Columbus, Columbus, Ohio (DLA Columbus)*, 53 FLRA 1114 at 1122-23 (1998). In *USN*, the Authority also stated that it "makes appropriate unit determinations on the basis of a variety of factors, without specifying the weight of any individual factors," citing, e.g., *Local 2004*, 47 FLRA 969, 972 (1993). The Authority also considered the effect on bargaining units of reorganizations that modify portions of the chains of command at managerial levels, but do not affect the day-to-day working conditions of bargaining unit employees. Finally, the Authority found that a change in the chain of command, by itself, will not render an existing unit inappropriate.

**Factors considered in cases raising issues related to changes in the character and scope of existing bargaining units are the same as any other cases in which appropriate unit issues are raised. However, three issues affect any determination the Region or the Authority makes with respect to the impact of a reorganization on employees in existing bargaining units.**

- a. **When seeking information about the three appropriate unit criteria, it is first necessary to address the factors from two perspectives: how the unit functioned prior to the change and how it functions after the change.** Evidence is obtained with respect to the mission and organizational structure and other appropriate unit criteria **both before and after the reorganization.** Changes to employees and their conditions of employment, particularly their day-to-day working conditions, the actual impact on employees and the impact on agency operations, the blending of employees are all compared to the employees' conditions of employment prior to the reorganization.

There are no hard and fast rules pertaining to determining unit appropriateness; and as a rule, no factor can “weigh” more than any other. However, given the circumstances of a reorganization and the changes resulting from the reorganization, each case may have factors that are more significant than others. Clearly the evidence has to be sufficient to enable the Regional Director and the Authority to make an affirmative decision that any proposed unit of exclusive recognition satisfies each of the three criteria. The Authority examines the totality of circumstances including the objective of preventing further fragmentation of bargaining units and reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure.

Prior to deciding the impact of a reorganization on an existing collective bargaining unit, an inquiry is made to ascertain what happened to employees affected by the reorganization, and, in particular, whether and how their conditions of employment were changed by the reorganization. Issues may concern the impact of the reorganization on an entire unit or on a particular group of employees in the unit. In reorganization-related representation cases that involve deciding the effects of a reorganization on an entire existing unit, the evidence must demonstrate how the reorganization affected the entire unit. Where the reorganization only affected some of the employees in the unit, the evidence must demonstrate that the employees at issue have significant employment concerns or personnel issues that are different or unique from those of other employees in the unit.<sup>9</sup> Application of the appropriate unit

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<sup>9</sup> See, e.g., *Defense Logistics Agency, Defense Supply Center Columbus, Columbus, Ohio*, 53 FLRA 1114, 1131 (1998) (*DLA Columbus*) (unique case involving appropriate unit, successorship and accretion questions where a union sought to continue to represent employees who had been geographically

(continued...)

criteria to changes in existing units requires a diagnostic approach to assessing the effect of the reorganization on the character and scope of the unit.

To summarize, when examining the effects of a reorganization on an existing appropriate unit, the evidence reflects the employees' terms and conditions of employment as well as other factors that are routinely considered when examining the appropriate unit criteria **both before and after** the reorganization. This is the best method for ensuring an adequate record and one that will provide sufficient information to decide the continued appropriateness of the unit and/or the extent that the reorganization affected employees in the existing unit.

**b. Additionally, timing is significant.**

Frequently, agencies involved in large reorganizations are not certain as to what the activity/agency structure will be upon completion of the reorganization, or when that completion will occur. Thus, there are interim organizations, relocations without official reassignments, and multi-year (phase-in) implementations. The timing of the petition could affect the outcome, and could result in the same reorganization being the subject of different petitions at different times. **When conducting hearings in such cases, the Regions ensure that the record reflects the stage of the reorganization and any further agency plans regarding future related reorganizations. Case law dictates that any unit determination is based on the facts presented at the time of the hearing.** *DPRO - Thiokol*, 41 FLRA at 327.

**c. Finally, the record examines the broad impact of the reorganization on the agency as well as the effect of the reorganization on the activity.<sup>10</sup>**

Considering the record from broad and narrow perspectives allows the Regional Director to consider all criteria and significantly, the issue of fragmentation. In this manner, the Regional Director solicits, and the parties introduce, sufficient evidence to resolve all issues.

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<sup>9</sup>(...continued)

relocated to an activity and the positions they encumbered were specifically both excluded from the unit represented by that union and included in the description of a unit represented by another union) and *FISC, Norfolk*, 52 FLRA at 961.

<sup>10</sup>See *Defense Mapping Agency* and *FISC, Norfolk*.

*FISC, Norfolk* is an excellent example of why it is necessary to obtain information about the affected employees from the perspectives of their inclusion in an appropriate unit prior to a reorganization and after a reorganization. In *FISC, Norfolk*, a case involving claims of successorship and accretion, the Authority had to balance the parties' competing claims: NAGE claimed that separating employees from the base-wide unit at the Yorktown detachment would be inappropriate and cause fragmentation; but FISC argued that not including the Yorktown detachment in FISC, Norfolk would cause fragmentation in FISC.

This case also demonstrates that it is important to obtain complete evidence about the facts and circumstances giving rise to the petition, i.e., often from a broader scope or perspective than reviewing the impact on the employees at a single site. For instance, if NAGE had filed the petition in FISC seeking a determination of the effect of the establishment of FISC only on its base-wide unit at Yorktown, the record may have emphasized different facts even though the results should have been the same. However, a review of relevant case law confirms that “how” and “what” evidence is presented may often lead to different results. Because the record in *FISC, Norfolk* presented evidence from both broad and narrow perspectives, the facts clearly demonstrated that including the Yorktown detachment in the FISC, Norfolk Activity was appropriate.

Once this information is obtained and evaluated, the facts are applied to the appropriate unit criteria set forth in section 7112(a) of the Statute. The facts are assessed to determine whether the change was a “paper” reorganization, i.e., nothing more than a technical change in the name of the activity or agency, or a change in the level of recognition; or whether the change affected the character and scope of the unit significantly enough to render it inappropriate.

There are a variety of representation scenarios and issues that may result from an agency reorganization:

- 1) Where the character and scope of a bargaining unit have not changed substantially, the Regional Director may properly find that the existing unit remains appropriate and the exclusive representative of that unit continues to be the exclusive representative of that unit. *Federal Aviation Administration, Aviation Standards National Field Office (Aviation Standards)*, 15 FLRA 60, 63 (1984).

- 2) A bargaining unit may be accreted to another established bargaining unit. *Id.* at 67-68; *Defense Contract Audit Agency*, 6 A/SLMR 251, 252 n.7 (1976).
- 3) One or more bargaining units may be combined to form an entirely new unit. *Department of the Army, 89th Army Reserve Command, Wichita, Kansas (Department of the Army)*, 7 A/SLMR 796, 798-99 (1977); *Navy Public Works Center, San Francisco Bay (Public Works Center)*, 6 A/SLMR 142, 147 (1976); .
  - (a) Where this new unit contains all the components of the previously recognized units, or where substantial portions of the former units can be identified within the new unit, and the new unit is appropriate for exclusive recognition, the Regional Director may properly order an election to determine which of the unions, if any, shall represent the new unit. *Department of the Army; Public Works Center*.
  - (b) Where, however, a substantial portion of the former units cannot be identified within the new unit, the Regional Director may properly decide not to order an election, especially where the new unit also includes employees who have previously been unrepresented. *Aviation Standards*, 15 FLRA at 67-68; *Department of the Army*.
- 4) A gaining entity may be a successor to the former entity and a union retains its status as the exclusive representative. *Naval Facilities Engineering Service Center, Port Hueneme, California (NFESC)*, 50 FLRA 363 (1995). A gaining entity may be a successor to the former entity and a union retains its status as the exclusive representative because it is sufficiently predominant over another labor organization that was also transferred to the new entity. *Department of the Army, U.S. Army Aviation Missile Command, Redstone Arsenal, Alabama (AMCOM II)*, 56 FLRA 126 (2000).
- 5) Due to a change in the character and scope of the unit: (1) a bargaining unit is no longer appropriate; and/or (2) an exclusive representative of an appropriate unit ceases to be the exclusive representative of that unit.

In the cases cited, it has been the "totality of the circumstances" upon

which the Authority based its decision that a unit may continue to be appropriate, or if not, whether and when an election is appropriate.

## **B. Successorship.**

Successorship involves a determination of the status of a bargaining relationship between an agency/activity which acquires employees who were in a previously existing bargaining unit, and a labor organization that exclusively represented those employees prior to their transfer. The representation petition is a nonadversarial process for determining the new activity's obligation to recognize and bargain with a union that had represented the employees of its predecessor.

When addressing successorship issues and other issues related to the effects of reorganizations on bargaining units, the interests in maintaining stable bargaining relationships that are affected by massive reorganizations must be balanced with the rights of employees to choose their representative. In *Naval Facilities Engineering Service Center, Port Hueneme, California, (NFESC)*, 50 FLRA 363 (1995), the Authority established three criteria to determine whether, following a reorganization, a new employing entity is the successor to a previous one such that a secret ballot election is not necessary to determine representation rights of employees who were transferred to the successor. The Authority will "find that a gaining entity is a successor, and a union retains its status as the exclusive representative of employees who are transferred to the successor, when:

- < An entire recognized unit, or a portion thereof, is transferred and the transferred employees: (a) are in an appropriate bargaining unit, under section 7112(a)(1) of the Statute; and (b) constitute a majority of the employees in such unit;
- < The gaining entity has substantially the same organizational mission as the losing entity, with the transferred employees performing substantially the same duties and functions under substantially similar working conditions in the gaining entity; and
- < It has not been demonstrated that an election is necessary to determine representation."

## 1. Criterion One - Characteristics of the unit:

The Authority stated that successorship is not precluded because an entire unit is not transferred intact to the new entity, *Hydrolines, Inc.*, 305 NLRB 416, 422 (1991); what is required is that the acquired employees must be in appropriate units both before and after successorship, *International Union of Petroleum & Industrial Workers v. NLRB*, 980 F.2d 774, 780 (D.C. Cir. 1992). The Authority also stated that the portion of the unit which is transferred need not constitute a separate appropriate unit by itself, provided that the transferred employees constitute a majority of the post-transfer unit. Thus, successorship is possible “even if only a portion of a unit is transferred, and a post-transfer unit may be found appropriate even if it has been expanded to include employees in addition to those transferred.”

A finding of successorship results in continued recognition without a new secret ballot election as required under the Statute. Thus, a finding of successorship depends on the fact that the affected union is the choice of a majority of employees in the claimed successor’s unit. Accordingly, although the post-transfer unit need not encompass the transferred employees exclusively, those employees must constitute a majority of the post-transfer unit.

In cases where the reorganization is ongoing or subject to long term implementation or a “start-up period,” the Authority has adopted the NLRB’s substantial and representative complement” test for determining whether the successor’s unit is sufficiently representative of the ultimate unit, in size and composition, so that it is appropriate to measure whether employees of the predecessor constitute a majority of the unit. See *Fall River Dyeing & Finishing Corp. v. NLRB (Fall River)*, 482 U.S. 27 (1987) and *Coast Guard*, 34 FLRA 946, 951-54 (1990). (The Authority adopted the “substantial and representative complement” test to determine whether and when to hold a representation election in an expanding unit.)

Summary of criterion:

- < An entire unit need not be transferred intact to the new entity. *NFESC*, 50 FLRA 363 (1995).
- < Acquired employees must be in appropriate units both before and after successorship. *NFESC*.

- < The portion of the unit which is transferred need not constitute a separate appropriate unit by itself, provided that the transferred employees constitute a majority of the post-transfer unit. *NFESC*.
- < The method used to move the employees from one entity to another has no bearing on the requirement that they be transferred. *FISC, Norfolk*, 52 FLRA 950 (1997).
- < “Transferred employees” set forth in *FISC* is a generic term that refers to any organizational movement of employees within an agency or between agencies, regardless of the method of the reorganization. *Defense Supply Center, Columbus*, 53 FLRA 1114(1998).
- < “Gaining organization” refers to a pre-existing or newly established organization. *FISC, Norfolk* at n.4.
- < Majority standard applies. *Department of the Interior, Bureau of Land Management, Sacramento, California, and Department of the Interior, Bureau of Land Management, Ukiah District office, Ukiah, California*, 53 FLRA 1417, 1422 (1998).

## **2. Criterion Two - Characteristics of the successor employer and continuity in working conditions:**

This criterion requires that the claimed successor have substantially the same organizational mission as the losing entity and that transferred employees perform substantially the same duties and functions under substantially similar working conditions after the transfer.

Summary of criterion:

- < The Authority does not require that the missions of the predecessor employer and the claimed successor be identical.
- < The question is whether in a basic sense, the new entity is in essentially the same business as its predecessor.
- < The emphasis is on the employees’ perspective, that is, whether the employer’s operations, as they affect unit employees, remain essentially the same after the transfer. *See Fall River*, 482 U.S. 27 (1987).
- < The Authority’s approach is primarily factual in nature and based

on the totality of circumstances of a given situation.

- < In order for the mission to be substantially changed, the mission of the new entity represents any new elements not found in one or more of the other disestablished organizations. See *NFESC*, 50 FLRA 363 (1995) and *AMCOM II*, 56 FLRA 126, 130 (2000) (the mission of the new entity blended the two missions of the former activities into the gaining employer while maintaining a mission in the new entity that is substantially the same as the missions in the disestablished entities).

### **3. Criterion Three - An election is not necessary:**

The mere filing of a representation petition for an election will not preclude the finding of successorship. The Authority has and will continue to decide whether units continue to be appropriate after reorganizations, and if not, whether and when an election is warranted. See *Morale, Welfare*, 45 FLRA 281 at 286 (1992) and *NFESC*, 50 FLRA 363 (1995).

- < An election may be necessary after a reorganization when more than one labor organization represents employees transferred into one new unit. *Social Security Administration, District Office, Valdosta, Georgia*, 52 FLRA 1084, 1091 (1997), and *Defense Supply Center Columbus*, 53 FLRA 1114, 1134 at (1998) citing *Martin Marietta Co*, 270 NLRB 821 (1984) and *Boston Gas Company*, 221 NLRB 628, 629 n.5.(1975).
- < But see *AMCOM II*, 56 FLRA 126, 131 (2000) where an election was not ordered because one union was sufficiently predominant and the Authority stated that: "we take as a guiding principle for determining whether one group is sufficiently predominant to render an election unnecessary whether there is a reasonable assurance of a meaningful contest" citing *Coast Guard*, 34 FLRA 946, 949 (1990). The Authority found that a union that represents more than 70% of the employees in the newly combined unit formerly represented by two or more unions is sufficiently predominant to render an election unnecessary because such an election would be a useless exercise.

When all three factors set forth above are met, the Authority will find that successorship exists and as a result, the agency/activity involved must recognize the exclusive representative of the employees in the unit without a new, secret ballot election.

#### **4. Competing claims of successorship:**

In *USN*, 56 FLRA 328, 332-333 (2000), the Authority discussed how it would resolve competing claims of successorship. The Authority stated that there is a preference in the Statute for preventing unit fragmentation when an existing unit otherwise remains appropriate. See *U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio (AFMC)*, 55 FLRA 359, 361 (1999). See also *Library of Congress and Fraternal Order of Police, Library of Congress Police Force Labor Committee (Library of Congress)*, 16 FLRA 429, 431 (1984). Consistent with this statutory preference, the Authority held that successorship claims should be resolved prior to accretion claims because a finding of successorship permits a union to retain its status as the employees' chosen, exclusive representative, rather than altering the relationship between the employees and their chosen representative by placing the employees in a different unit. See *FISC, Norfolk*, 52 FLRA 950, 954 (1997).

Consistent with these policies, the Authority held that, when presented with competing successorship claims alleging different appropriate units, they first consider the appropriate unit claim that will most fully preserve the *status quo* in terms of unit structure and the relationship of employees to their chosen exclusive representative. If the Authority finds that a petitioned-for, existing unit continues to be appropriate, then they will not address any petitions that attempt to establish different unit structures, because the Statute requires only that a proposed unit be *an* appropriate unit, not the most, or the only, appropriate unit. See *Department of the Navy, Naval Supply Center, Puget Sound, Bremerton, Washington* and *Department of the Navy, Fleet Industrial Supply Center, Bremerton, Washington (FISC, Bremerton)*, 53 FLRA 173 at 183, n.9 (1997).

***See HOG 39B for specific guidance on developing a record about successorship at hearing.***

### C. Accretion.

Accretion involves the addition, without an election, of a group of employees to an existing bargaining unit. Accretion issues most frequently arise as a result of a reorganization or realignment of agency operations. *Department of the Navy, Naval Hospital, Submarine Base Bangor Clinic, Bremerton, Washington*, 15 FLRA 125 (1984). The employees at issue in an accretion case may come from another established organizational entity (i.e., agency or activity or subdivision thereof) or may be a newly established category of employees that do not fall within the express language of the current unit description. Accretion also may arise as an issue in an election case if a party contends that the employees subject to the petition have accreted to an existing unit. See *Department of the Air Force, 6th Missile Warning Squadron, Otis Air Force Base*, 3 FLRA 112 (1980).

#### To find accretion, the acquired employees:

- < are not in newly created positions that fall within the express language of the unit description. *Department of the Army, Headquarters, Fort Dix, Fort Dix, New Jersey (Fort Dix)*, 53 FRA 287 (1997). See RCL 15.
- < do not constitute an appropriate separate bargaining unit on their own.
- < become functionally and administratively integrated into the gaining organization's pre-existing unit(s), and that adding the transferred employees to the unit(s) would be appropriate under section 7112(a) of the Statute in that the employees in the resulting unit share a community of interest with employees in the established unit and the resulting unit promotes effective dealings with and efficiency of operations of the agency. *U.S. Department of Energy, Oak Ridge Operations Office, Oak Ridge, Tennessee (DOE Oak Ridge)*, 15 FLRA 130 (1984) (no accretion found). Compare, *Department of the Navy, Naval Hospital, Submarine Base Bangor Clinic, Bremerton, Washington*, 15 FLRA 125 (1984) (employees administratively transferred along with their function into a different activity were accreted into an existing bargaining unit, as requested by the gaining activity and the labor organization exclusively representing that activity's employees, inasmuch as the inclusion of such employees in the

established bargaining unit satisfied the three criteria of section 7112(a) of the Statute). *AMCOM II*, 56 FLRA 126.

A finding of accretion forecloses an employee's basic right to select an exclusive representative. Therefore, any accretion issues must be carefully considered. Accretion will not be found in a reorganization case in which the employees sought to be added to the existing unit continue to maintain a separate and distinct identity and have not been functionally, operationally or physically integrated into the existing unit. See *DOE Oak Ridge; Naval Air Station, Meridian, Michigan*, 9 FLRA 22 (1982); *General Services Administration, National Capital Region*, 5 FLRA 285 (1981).

**The Office of the General Counsel has established the following guidelines for processing cases involving accretion issues:**

- 1. The first step is to determine whether the acquired employees constitute a separate appropriate unit. The following factors are considered:**
  - a. whether the acquired employees have a clear and identifiable community of interest separate and distinct from other employees;
  - b. whether the acquired employees have been functionally and administratively integrated with other employees in the existing bargaining unit such that they do not have a clear and identifiable separate community of interest;
  - c. whether proposed unit configurations would promote effective dealings and efficiency of operations; and
  - d. whether a separate unit would result in fragmentation of units.
- 2. If the investigation establishes that the acquired employees constitute a separate appropriate unit, the region decides:**
  - a. in a reorganization, whether the new employer is a successor for purposes of collective bargaining with the labor organization that represented these employees at the predecessor.
  - b. if no reorganization, and the issue concerns whether a

newly established office, clinic or other organization is an accretion to an existing unit, whether the unit is appropriate as a separate stand alone unit.

- < If yes - in a reorganization case, the region applies the successorship criteria and if it finds successorship, issues an appropriate certification. For guidance on successorship, see *RCL 3B* and *NFECs*, 50 FLRA 363, n.7 and n.11 (1995). See also *CHM 23.7*.
- < If yes - in a newly established organization scenario, the petition is dismissed and the union is required to refile the petition with an adequate showing of interest.
- < If yes, but there are competing claims for representation, the region decides whether combining the subject employees with the employees in the existing unit would result in an overall appropriate unit.
  - If yes, the processing an election under these circumstances is novel particularly whether a self-determination election is warranted. See *U.S. Department of Labor, Pension and Welfare Benefits Administration*, 38 FLRA 65, 73 (1990); *NFESC*, 50 FLRA 363, 364 n.11, citing *Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969). See **CHM 58.3.17**.
  - If no, dismiss - requirement to file petition with a showing of interest for an election.

The acquired employees constitute a separate appropriate unit, but successorship is not warranted (either because the employees were previously unrepresented or the unit did not meet the successorship criteria). Moreover, the acquired employees do not share a sufficient community of interest to be included in the existing unit. In such cases, the petition would be dismissed. The only way a labor organization could represent these employees is through a petition seeking an election. The petition must be accompanied by a showing of interest.

3. **If the investigation establishes that the acquired or subject employees do not constitute a separate appropriate unit, the region decides whether it is appropriate to accrete these employees into the existing unit.**

< If yes - clarify existing unit to include acquired employees.

If the acquired employees are functionally and administratively integrated into the existing unit and adding the acquired employees to the existing unit results in an appropriate unit under section 7112(a), an accretion may be found. If accretion is found, the unit is clarified to include the accreted employees. *FISC, Norfolk*, 52 FLRA at 963.

< If no - dismiss.

There may be situations where neither an accretion nor a separate unit is appropriate. In this case the petition is dismissed. *Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina*, 36 FLRA 237 (1990).

#### **4. Considerations in Reorganizations Where Accretion is Claimed:**

A significant consideration in a petition asserting accretion based on reorganization is the timing of the petition. Parties may file accretion petitions in anticipation of future changes, which could result in unit determinations based on speculation as to the impact of changes. On the other hand, delay in deciding accretion questions until all organizational changes have occurred may place the representational status of affected employees in limbo during the interim, another undesirable result. The standard to apply in determining whether the accretion petition has been filed at an appropriate time for making a decision in the matter is the “substantial and representative complement” test. See *NFESC*, 50 at 372, fn 9, which applied the “substantial and representative complement” test to successorship situations. (See, *RCL 2 - Scope of Unit*, for discussion of expanding units).

Another issue in an accretion case is “numerical overshadowing,” that is, whether there are more employees in the acquired group of employees than in the existing unit. Accretion is not found if the numbers of acquired employees exceeds the number of employees in the existing unit. See *DHHS*, 43 FLRA 1245 (1992); *Air Force Material Command*, 47 FLRA 602 (1993) citing *Renaissance Center Partnership*, 239 NLRB 1247 (1979). In *Department of the Interior, Bureau of Land Management, Sacramento, California, and Department of the Interior, Bureau of Land Management, Ukiah District Office, Ukiah, California*, 53 FLRA 1417, 1422 (1998) the Authority stated that it “will continue to apply the majority standard in accretion cases involving groups of represented and unrepresented employees. Accordingly, to the extent the Authority previously stated that the ‘nearly equals or exceeds’ standard applies in accretion cases, those

cases will no longer be followed.”

## **5. Previously Excluded Employees:**

Accretion is not found in circumstances where the petitioner seeks to include in an existing unit a group or category of employees who were specifically excluded from that unit, unless the evidence establishes that meaningful changes have occurred in the employment status of the previously excluded group. If no such changes have occurred, then election procedures are required to add the group of employees to the existing unit. *FTC II*, 35 FLRA 576 (1990). See also *RCL 2 - Scope of Units, Residual Units*.

## **6. Questions have been raised concerning the differences between accretion and successorship in reorganization cases.**

Essentially, accretion concerns the status of a group of employees while successorship concerns the status of a bargaining relationship between an agency/activity which acquires employees who were in a previously existing bargaining unit and a labor organization that exclusively represented those employees prior to their transfer. Reorganizations often raise both accretion and successorship issues because the impact of what happened is not immediately clear on the unit structure. It is important to find out what happened to the employees and determine how the reorganization affected their conditions of employment. Once information is gathered, the factors of accretion and successorship can be applied and analyzed. It is not possible to have both an accretion and a successorship involving the same employees.

***See HOG 39C for specific guidance on developing a record about accretion at hearing.***

### ***Other References:***

*Headquarters, 97th U.S. Army Reserve Command, Fort George G. Meade, Maryland*, 32 FLRA 567 (1988).

*Department of the Air Force, 6th Missile Warning Squadron, Otis Air Force Base*, 3 FLRA 112 (1980)

*AMCOM II*, 56 FLRA 126 (2000)

*U.S. Department of the Air Force, Air Force Material Command, Wright-Patterson Air Force Base, Ohio*, 47 FLRA 602 (1993)

## D. Competing Claims of Successorship and Accretion.

*FISC, Norfolk*, 52 FLRA 950 (1997) involved the Department of the Navy's decision to consolidate and reorganize its purchasing and supply functions, and the resultant representation petitions that were filed in this case, **presented the Authority with an opportunity to clarify how it will analyze reorganization cases in which both successorship principles and accretion principles are claimed to apply to the same employees.**

### 1. Overview:

The Authority found that the most expeditious way to resolve such cases is to begin with a determination of whether the transferred employees are included in, and constitute a majority of employees in, a separate appropriate unit in the new employing entity. The first analytic step in resolving both successorship and accretion claims is to determine whether the transferred employees are included in, and constitute a majority of employees in a separate appropriate unit.

Once this determination has been made, the Authority will proceed to apply either the remaining successorship principles, or the remaining accretion principles, as appropriate.

### 2. Analytic framework adopted by the Authority:

- a. When resolving cases arising from a reorganization where employees are transferred to a pre-existing or newly established organization and both successorship and accretion principles are claimed to apply, the Authority adopted the following framework:
  - 1) Initially, the Authority determines whether employees who have been transferred are included in, and constitute a majority of, a separate appropriate unit(s) in the gaining organization under section 7112(a) of the statute. The outcome of this inquiry governs whether successorship or accretion principles are next applied.
  - 2) If it is determined that the transferred employees are included in a separate appropriate unit(s) in the gaining organization under section 7112(a), and if they constitute a majority of the employees in that unit(s), the Authority applies the remainder of the successorship factors set forth in *NFESC*, 50 FLRA 363, with respect to the unit(s) determined to be appropriate. The outcome of the *NFESC* analysis determines whether the

gaining organization is a successor for purposes of collective bargaining with the labor organization(s) that represented the transferred employees at their previous employer.

- 3) If it is determined that the transferred employees are not included in, and constitute a majority of employees in, a separate appropriate unit in the gaining organization, the Authority applies its long-established accretion principles. The outcome of this analysis determines whether the transferred employees have accreted to a pre-existing unit in the gaining organization.

b. Explanation of the framework:

- 1) Determine whether the transferred employees are included in a separate appropriate unit:
  - (a) The Authority first examines whether the transferred employees are included in a separate appropriate unit in the gaining organization and if they constitute a majority of the employees in that unit. This step of the analysis corresponds to the first factor set forth in *NFESC* which requires, inter alia, that “the post-transfer unit must be appropriate.” For a discussion of the factors required in making appropriate unit determinations, see RCL 1 and Part A of this chapter discussing in detail FISC, Norfolk, 52 FLRA 950, See also FISC, Norfolk at 961, n.6.
  - (b) The Authority stated that the application of the appropriate unit criteria to the facts of each case will determine the appropriateness of any proposed unit. If it finds that the transferred employees are included in, and constitute a majority of the employees in, a separate appropriate unit in the gaining organization, the Authority will proceed to determine whether the remaining successorship factors set forth in *NFESC* have been met.

Alternatively, if the Authority finds that the transferred employees are not included in, and constitute a majority of the employees in, a

separate appropriate unit, the Authority will proceed to determine whether the transferred employees have accreted to another bargaining unit, as claimed.

- 2) If the transferred employees are included in, and constitute a majority of the employees in, a separate appropriate unit in the gaining organization, apply the remaining successorship factors.
  - (a) Examine the following:
    - < whether the gaining organization has substantially the same organizational mission as the losing entity, with the transferred employees performing substantially the same duties and functions under substantially similar working conditions after the transfer; and
    - < whether an election is necessary to determine the representation rights of the transferred employees.
  - (b) If all of the factors set forth in *NFESC* have been met, the Authority finds that successorship exists and, as a result, that the gaining organization must recognize, without a secret ballot election, the exclusive representative of the transferred employees prior to their transfer. An appropriate certification is issued and any competing accretion petition(s) for the same group of employees is dismissed.
- 3) If successorship is not appropriate, consider accretion claims. First, consider:
  - (a) Whether the transferred employees are functionally and administratively integrated into the gaining organization's pre-existing unit(s); and
  - (b) Whether adding the transferred employees to the unit(s) would be appropriate under section 7112(a).

- (c) If both tests are met, accretion will be found.

The Authority reiterated that in deciding questions of accretion, it is bound by the three criteria for determining the appropriateness of any unit set forth in section 7112(a) of the Statute.

c. Impact of imminent reorganizations:

One of the issues raised in *FISC, Norfolk* was the impact of any imminent reorganization have on the bargaining units whose status is an issue. The Authority cited *DPRO Thiokol*, 41 FLRA 316, at 327: decisions regarding unit determinations must reflect the conditions of employment that existed at the time of the hearing rather than what may exist in the future, unless there are definite and imminent changes planned by the agency.

d. Quality of the record:

**The quality of the record is vitally important.** *FISC, Norfolk*, and *FISC, Bremerton*, 53 FLRA 173, presented the same issues. The decisions in these two cases were different. In *FISC, Norfolk*, the Regional Director affirmed the Authority's finding of accretion. In *FISC, Bremerton*, 53 FLRA 173 (1997), the Authority affirmed the Regional Director's finding that FISC, Concord Detachment was a successor employer to the Concord Naval Weapons Station (NWS Concord) for an appropriate unit of employees transferred from NWS Concord to the newly established FISC, Concord Detachment. The Regional Director, as affirmed by the Authority, based his decision on different facts in the record.

## E. Consolidated Units:

When applying the appropriate unit criteria to a successorship/accretion situation that involves a consolidated bargaining unit, the criteria are applied with respect to the entire nationwide consolidated unit. The Region does not apply the criteria to any organizational segment (or former unit encompassed within the consolidated unit) below the level of exclusive recognition. Thus, successorship and accretion issues are not considered below the level of exclusive recognition. *Compare Social Security Administration, District Office, Valdosta, Georgia* (SSA, *Valdosta*), 52 FLRA 1084 (1997).

## F. Unresolved Issues:

Since the Authority in *AMCOM II*, 56 FLRA 126 (2000) found prong two of the successorship criteria (substantially same organization mission, duties and working conditions) to be met, it was unnecessary to address whether the new "sufficiently predominate" standard would be applicable to "merger" situations where the second successorship prong has not been satisfied. This issue continues to remain unresolved.

NOTE: In three cases that the Authority considered in the past three years, issues of a question concerning representation were raised in the context of reorganizations. The issue outlined above has not yet been resolved based on the facts of the case as analyzed using the *FISC, Norfolk* framework. In *SSA, Valdosta*, 52 FLRA 1084, 1090, the Authority stated that it and the NLRB have found that an election would be necessary to determine representation after a reorganization or consolidation when the number of unrepresented employees in the gaining entity exceeds the number of represented employees [citing *HHS, Region II*, 43 FLRA 1245 (1992) and *Renaissance Center Partnership*, 239 NLRB 1247 (1979)]. The Authority also noted that the NLRB found an election necessary after a reorganization when more than one labor organization represents employees transferred into one new unit. *Martin Marietta Co.*, 270 NLRB 821 (1984) in which the NLRB said:

When an employer merges two groups of employees who have been historically represented by different unions, a question concerning representation arises, and the Board will not impose a union by applying its accretion policy where neither group of employees is sufficiently predominant to remove the question concerning representation.

In *DLA, Columbus*, 53 FLRA 1114, the Authority stated: "In the context of an agency realignment of functions, the Authority has ordered an election where the employees at issue could be part of two petitioned-for appropriate units," citing *DLA, Akron*, 15 FLRA 962 (1984). As the Authority held in *DLA, Akron*, where "the considerations in favor of each [unit] are evenly balanced, the determining factor should be the desires of the employees themselves." *Id.* at 966.

In addition the Authority reiterated that an election may be necessary where, as here, more than one labor organization represents employees transferred into the new unit. See *SSA, Valdosta*, 52 FLRA at 1091. The Authority also cited supporting NLRB case law where it found an election necessary after a reorganization or corporate merger where more than

one labor organization has represented employees in the new unit and neither group is sufficiently predominant (emphasis added) to remove the question of overall representation. *Seven-Up*, 281 NLRB 943 at 946 (1986); *Boston Gas Company*, 221 NLRB 628, 629 n.5 (1975). On the other hand, the Authority noted NLRB case law that said that it will not direct an election where it would be a useless exercise or prejudicial to the dominant group. (citing the same cases).

The Authority had an opportunity in its *Order Granting Application for Review and Denying Stay of Election in Department of the Army, U.S. Army Aviation Missile Command, Redstone Arsenal, Alabama (AMCOM I)*, 55 FLRA 640 (1999), to consider when an election is necessary where a reorganization has rendered inappropriate separate, preexisting bargaining units inappropriate. However, as noted, it found prong 2 of the successorship criteria met and created a standard for finding unions sufficiently predominant in that context. **When successorship issues involve more than one union, regions should be attentive to any cases in which prong 2 of the successorship criteria is not met. See CHM 58.3.18.**